

Louisiana 5 - Beauregard RSA ("LA 5 RSA") and Louisiana 7 - West Feliciana RSA ("LA 7 RSA"). However, BMI had prospectively refused to provide roaming service to Radiofone's affiliate. See Supplement to Complaint, at 3, Attachment B.

During the cellular licensing process, Radiofone's affiliate challenged BMI's prospective refusal to provide roaming to non-affiliated carriers in the LA 5 and LA 7 RSA markets. The Mobile Services Division agreed that BMI's prospective refusal was contrary to the FCC's rules and conditioned grant of the new cell site application on the basis of providing roamer service to BRCTC's cellular customers in the LA 5 and LA 7 RSAs. Baton Rouge MSA Limited Partnership, 6 FCC Rcd. 5948 (1991) [hereinafter Order].⁶ Radiofone subsequently filed an Addendum to Supplement to Complaint (on October 24, 1991) to supply the record with a copy of the Mobile Services Division Order.

In an extraordinary effort to thwart both the Mobile Services Division Order and BRCTC's roaming ability in the LA 5 and LA 7 RSAs, BMI returned the authorization to construct the cell site. BMI's Reply to Opposition to Petition for Reconsideration, filed in connection with an unsuccessful effort to have the Order reconsidered, recounts BMI's willingness to forego the authorization rather than allow the requested

⁶ On reconsideration, the Common Carrier Bureau employed a different legal theory to hold that BMI was under a duty to provide roamer service to BRCTC's customers. Baton Rouge MSA Limited Partnership, 8 FCC Rcd. 2889 (Com. Car. Bur. 1993).

roaming. See Reply to Opposition to Petition for Reconsideration, at 4-5 (appended as Attachment A hereto). Consequently, Radiofone and its affiliates were denied the ability to roam in the LA 5 and LA 7 RSAs until March 27, 1992 and May 26, 1994, respectively, the dates when the Commission's records indicate that non-wireline facilities were placed into commercial service.

C. The Second Supplement to the Complaint

On June 16, 1995, Radiofone filed the second Supplement to Complaint, detailing further instances in BMI's continuing pattern of roaming interference. For instance, the Supplement recounts the denial of roamer service to Radiofone customers attempting to roam in BMI's service area near Plaquemine, Louisiana. Despite repeated requests by Radiofone, the service was not restored until after the intervention of the Louisiana Public Service Commission. June 16, 1995 Supplement to Complaint, at 4, Exhibit B. The Supplement also reports four other instances of roaming interruption, including instances where, like the "450-8XXX" roamer interruption several years earlier, the decision not to restore service (if not the decision to interfere with roamer service in the first instance) was a calculated decision by BMI management. Id. at 2-3, Exhibit A; see also id. at 3, Exhibits C, D.⁷

⁷ Radiofone wishes to correct an inadvertent misstatement of the procedural history of this case contained in its Reply to Answer to Second Supplement to Complaint, at 1-2.

BMI's Answer to the Supplement principally focused on matters of procedure. It argued that the Supplement was an unauthorized pleading (as it did in the case of the first Supplement), that the matters in the Supplement were barred under the statute of limitations and "laches," that BMI had responded to the outages, (and therefore, apparently, Radiofone was not damaged), and that the issues raised by Radiofone had already been resolved as Informal Complaints. Answer, at 8-12.

On the merits, BMI argued that the interruptions to Radiofone's customers were "minor"; they were the fault of a former BMI employee who "misunderstood" BMI's roaming policies, Answer to Second Supplement to Complaint, at 12, Exhibit A, para. 3; they were Motorola's fault; and, in any event, the interruptions were an acceptable norm in the cellular industry, id. at 12-13. BMI also argued that it simply could not respond to one disconnection episode (and, incredibly, attempted to blame Radiofone for this failure), and that, in any event, Radiofone's customers had manual roaming available to them when automatic roaming was denied. Id. at 11, 13.

Radiofone's Reply responded to BMI's procedural allegations, including the suggestions that Radiofone was guilty of "laches" and that the Supplement was barred by the

There, Radiofone stated that the initial Complaint was filed on behalf of the Baton Rouge Cellular Telephone Company (BRCTC), its commonly controlled affiliate. As the record reflects, the initial Complaint was filed on behalf of Radiofone. The first Supplement, as the record also reflects, was filed to reflect prospective anticompetitive activity against Radiofone's commonly controlled affiliate, BRCTC.

Commission's Informal Complaint rules. See Reply to Answer to Second Supplemental Complaint, at 4-7. Radiofone also took issue with BMI's suggestion that the alleged availability of manual roaming was an acceptable substitute for automatic roaming, and noted the anticompetitive consequences of sudden, unannounced discontinuances of service of this sort. Id. at 9-10. Radiofone concluded that the conduct in the second Supplement was merely a continuation of the pattern of anticompetitive conduct detailed in Radiofone's original Complaint and the January 15, 1991 Supplement. Id. at 11.⁸

II. ARGUMENT

A. BMI's Failure to Assess Itself the \$2.00 Per Diem Roaming Fee, While Assessing the Charge to Radiofone, Was Unlawfully Discriminatory

This Brief has previously discussed BMI's insistence, in papers and affidavits filed with the Commission, that it had assessed the \$2.00 per diem roaming charge between its "wholesale" affiliates, owned by BMI, and BMI itself acting as the retail arm. These assurances were false, however, as BMI was forced to admit once its financial records were produced and examined in discovery. See Affidavit of William T. Bishop, Jr.

⁸ BMI's argument that the May 22, 1993 episode is outside of the two-year Statute of Limitations is without merit. The original Complaint alleged a pattern of anticompetitive conduct against Radiofone. Complaint, at 11. The activity covered in the second Supplement is additional evidence of that pattern, and the Commission should hold that all of these activities, including the first Supplement, relate back to the original Complaint.

June 16, 1995 Supplement to Complaint, Exhibit A. This one-sided availability of automatic roaming obviously made Radiofone's service appear inferior to BMI, and was anticompetitive.

Moreover, all of BMI's automatic (and, at least in the case of Lafayette, manual) roaming interruptions were done without notice to Radiofone or its customers. See, e.g., id. Exhibit C. It is not difficult to understand how these repeated, disruptive actions harmed Radiofone as a competitor.

In sum, this pattern of conduct was anticompetitive in its effect, and was motivated by anticompetitive considerations on BMI's part. The Commission's authority to remedy those violations is clear under Section 314 of the Act and, as Radiofone's Offer of Proof demonstrates, its damages have been considerable.

C. Radiofone's Damages -- The Offer of Proof

The Commission's May 9, 1996 letter to the parties required an Offer of Proof on the issue of Radiofone's damages. This showing is for the purpose of demonstrating Radiofone's ability to meet its burden of proof in further proceedings.

Radiofone's Offer of Proof is supplied with this Brief. Affidavit of James T. McClave Ph.D. (appended as Attachment F). It shows that Radiofone's lost profits are \$17,942,263.00 as a result of BMI's anticompetitive activity. Radiofone's loss of subscribers, upon which this calculation is based, coincides

almost precisely with BMI's anticompetitive activity. Id. Figures 2-3. This calculation is a conservative number for several reasons. The lost profit calculation assumes that BMI's business interference resulted in no additional lost subscribers after 1993, although Radiofone's 1994 growth rate continued to lag behind the national average; the profits calculation does not take into account additional profits Radiofone would have had but for BMI's activities; the lost profit calculation focuses on Radiofone's New Orleans cellular operations only; and no interest has been added to the calculation. Id.

The qualifications of Dr. McClave are superior. In addition to his vast experience in econometrics modeling, damages analysis and statistics, he has taught statistics at the university level since 1966. He is currently an Adjunct Professor, Business and Economic Statistics, in the Graduate School of Business at the University of Florida. He has authored or co-authored seven books and eighteen articles in professional literature. Dr. McClave's qualifications and experience comprise a twenty-seven page document included with his affidavit.

Radiofone submits that the results of Dr. McClave's study clearly demonstrate that its lost profit damages are at least \$17,942,263.00, and that Radiofone will be able to carry its burden of proof on this issue in further proceedings.



December 3, 1996

**Via Facsimile and
By Certified Letter
Return Receipt Requested**

Victoria K. McHenry, Esq.
BellSouth Telecommunications, Inc.
365 Canal Street, Room 1870
New Orleans, LA 70130-1102

David M. Falgoust, Esq.
BellSouth Telecommunications, Inc.
675 West Peachtree Street, Suite 4300
Atlanta, GA 30375-0001

Re: Mutual Compensation

Dear Vickie and David:

In accordance with the Telecommunications Act of 1996 and Section 51.717(b) of the Federal Communications Commission Rules, Radiofone, Inc., Baton Rouge Cellular Telephone Company and Houma/Thibodaux Cellular Partnership hereby requests mutual compensation for interconnection services at the rates currently tariffed with the Louisiana Public Service Commission. This is not a request for a renegotiation of the existing tariffed rates.

At the end of the month, we will supply you with the number of minutes terminated on our systems and will deduct the amount of money owed to us from your billing.

If you have any questions, please call me.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Mark J. Jeansonne".

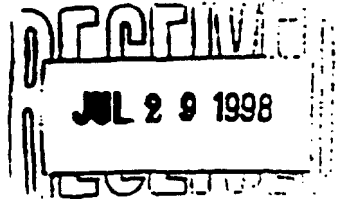
Mark J. Jeansonne

MJJ/sv

cc: Harrell Freeman



BellSouth Interconnection Services
Interconnection Purchasing Center
ISA1
600 North 19th Street
Birmingham Alabama 35203



July 24, 1998

Radiofone Inc.
Mary Bennett
P.O. Box 8760
Metairie, La. 70002

RE: Disputed Mutual Compensation Billing

Dear Ms. Bennett:

Several attempts have been made to contact you regarding charges on your invoices. No response has been provided to our calls or the January, 1998 written request for explanation of the charges. BellSouth is disputing the full amount invoiced pending explanation of the type usage invoiced. The disputed amount, to date, is \$688,891.00, which includes \$64,616.00 payment mailed to you, in error, on October 31, 1997 for the September, 1997 invoice.

Please review the usage charges invoiced and advise BellSouth of the type usage invoiced as quickly as possible. Attached is a spreadsheet that summarizes the charges, minutes of use and messages invoiced. Please contact Betty Jones at 800 666-0580 extension 62157, if you have questions or would like to discuss.

Sincerely,

A handwritten signature in cursive script that reads "Betty Jones".

Betty Jones
Service Representative

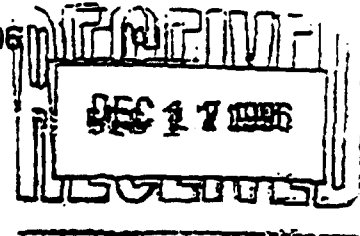
Attachment

© Bellsouth

BellSouth Interconnection Services

December 11, 1996

Mark J. Jeansonne
Radiofone
3131 North I-10 Service Road
Metairie, Louisiana 70002



Dear Mark,

In conjunction with your request for reciprocal compensation with BellSouth under the Telecommunications Act of 1996, I would like to present to you the reciprocal compensation methodology preferred by BellSouth. We have established one point for the receipt and payment of reciprocal compensation bills and have developed a list of information necessary for BellSouth to process reciprocal compensation payments. Your letter dated December 3, 1996 and sent via facsimile serves as the date for reciprocal compensation to begin.

Bills should be sent to the attention of:

Charles Morris
BellSouth Telecommunications
600 N. 19th St. 8th Floor/Journals
Birmingham, Alabama 35203

BellSouth would prefer receiving one summary monthly (calendar) bill per wireless provider sent to the location above. If the billing is for termination usage for multiple states, however, the billing and usage should be segregated by state. BellSouth would like the following information provided on the bill:

1. What the billing is for
2. Date range involved
3. Number of calls
4. Minutes of use
5. Rate(s) to be applied
6. Billed amount owed
7. Segregated by state

Attached is a proposed sample format for your consideration. Please contact me at (205) 977 - 0461 if I can be of assistance.

Sincerely,

Randy Ham

Attachment

CERTIFICATE OF SERVICE

I, Susan Bahr, an attorney with Blooston, Mordkofsky, Jackson & Dickens, certify that on this 28th day of August 1998, I have caused to be sent via first class U.S. mail copies of the foregoing Reply Comments to:

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